123 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Consolidated Edison Development, Inc. Docket No. EC08-36-000
CED/SCS Newington, LLC
Consolidated Edison Energy Massachusetts, Inc.
Newington Energy, LLC
CED Rock Springs, LLC
Lakewood Cogeneration L.P.
Ocean Peaking Power, L.L.C.
North American Energy Alliance, LLC
Allco Finance Group Limited
Industry Funds Management (Nominees) Limited,
as trustee of the IFM Infrastructure Fund

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued April 4, 2008)

1. On January 9, 2008, Applicants[1] filed an application under section 203 of the Federal Power Act (FPA)[2] requesting Commission authorization for a disposition of

[1] The Applicants in this proceeding are: Consolidated Edison Development, Inc. (ConEd Development), CED/SCS Newington, L.L.C. (CED/SCS Newington), Consolidated Edison Energy Massachusetts, Inc. (CEEMI), Newington Energy, L.L.C. (Newington), CED Rock Springs, L.L.C. (CED Rock Springs), Lakewood Cogeneration L.P. (Lakewood), Ocean Peaking Power, L.L.C. (Ocean Peaking), North American Energy Alliance, L.L.C. (North American Energy), Allco Finance Group Limited (Allco), and Industry Funds Management Limited (Nominees), as trustee of the IFM Infrastructure Fund (IFM Nominees).

[2] 16 U.S.C. § 824b (2000), *as amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005).

jurisdictional facilities. ConEd Development and CED/SCS Newington plan to transfer certain direct and indirect equity interests in CEEMI, Newington, CED Rock Springs, Lakewood, and Ocean Peaking (collectively, the Project Companies) to North American Energy. The affected jurisdictional facilities include limited interconnection and transmission facilities, market-based rate tariffs and contracts, reactive power rate schedules and Reliability Must Run (RMR) Agreements of the Project Companies.

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.[3] As discussed below, we will authorize the proposed transaction as consistent with the public interest.

I. Background

A. Description of the Parties

3. CEEMI owns and operates certain generating units that sell power under RMR Agreements. ConEd Development, a wholly-owned direct subsidiary of Consolidated Edison, Inc., is an independent power producer that develops, builds, and operates electric generation plants, primarily in the Northeast and Mid-Atlantic regions. CED/SCS Newington is a subsidiary of ConEd Development.

4. The Project Companies, which are owned directly and indirectly by ConEd Development, are authorized to sell power at market-based rates. CEEMI owns and operates hydroelectric facilities, gas turbines and thermal units in the ISO-New England (ISO-NE) control area totaling approximately 281 megawatts (MW) of generating capacity. Newington leases a 525 MW combined-cycle facility in Newington, New Hampshire. CED Rock Springs owns two generation units totaling 352.1 MW as part of a four-unit, gas-fired, peaking generating facility in Rising Sun, Maryland. Lakewood owns a nominal 246 MW dual-fuel cogeneration facility in Lakewood, New Jersey. Ocean Peaking owns a nominal 351 MW gas-fired peaking facility, also in Lakewood, New Jersey.

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[3] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001); *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification*, 122 FERC ¶ 61,157 (2008); *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

5. North American Energy is a jointly-owned, indirect subsidiary of Allco and IFM Nominees. Allco is a global financial services business operating throughout Australia, UK/Europe, North America and Asia. IFM Nominees is trustee for the IFM Trust, a fund holding investments in international infrastructure assets.

B. Description of the Application

6. The transaction would allow North American Energy to acquire ConEd Development's and CED/SCS Newington's interests in the Project Companies. It would take place through two separate purchase and sale agreements. The first agreement is between ConEd Development and North American Energy for 100 percent of ConEd Development's direct or indirect ownership interest in CEEMI, CED Rock Springs, Lakewood and Ocean Peaking project companies. The second agreement is between CED/SCS Newington and North American Energy for CED/SCS Newington's interests in its 525 MW facility. Applicants state that the transaction is consistent with the public interest and will not have an adverse effect on competition, rates or regulation or result in cross-subsidization.

II. Notice and Responsive Filings

7. Notice of the Applicants' January 9, 2008 filing was published in the *Federal Register*, 73 Fed. Reg. 4,552 (2008), with interventions and protests due on or before January 30, 2008. Massachusetts Municipal Wholesale Electric Company, Chicopee Municipal Lighting Plant and South Hadley Electric Light Department (collectively, Public Systems) filed a timely motion to intervene and protest. Applicants filed a motion for leave to answer and an answer.

8. On March 3, 2008, the Commission's staff issued a deficiency letter directing Applicants to address questions regarding the proposed transaction. On March 10, 2008, Applicants submitted a filing in response to the deficiency letter (supplemental filing). Notice of the Applicants' supplemental filing was published in the *Federal Register*, 73 Fed. Reg. 14,790 (2008), with comments due on or before March 17, 2008. Public Systems filed timely comments and a protest in response to the supplemental filing.

III. Discussion

A. Procedural Issues

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[4] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

[4] 18 C.F.R. § 385.214 (2007).

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[5] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

11. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. Under the Commission's regulations, its analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[6] Section 203 also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[7] The Commission's regulations establish verification and informational requirements for applicants that seek determinations that a transaction will not result in inappropriate cross-subsidization or an inappropriate pledge or encumbrance of utility assets.[8]

C. Substantive Issues

1. Preliminary Issues

12. Applicants state that Commission authorization under FPA section 203(a)(2) may not be required because North American Energy, the entity acquiring the Project Companies, is a newly-formed subsidiary of IFM Nominees and is not itself a holding company. We need not decide this issue.[9]

13. In the supplemental filing submitted in response to the deficiency letter, Applicants list a change in ownership that pertains to the proposed transaction. When the

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[5] 18 C.F.R. § 385.213(a)(2) (2007).

[6] *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

[7] 16 U.S.C. § 824b(a)(4) (2000), *amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

[8] 18 C.F.R. § 33.2 (2007).

[9] Because section 203(a)(1) uses the same substantive standard as section 203(a)(2), and Applicants do not contend that section 203(a)(1) is inapplicable to North American Energy, we need not reach the issue of whether section 203(a)(2) applies.

original application was filed, AllCapital North American Energy Holdings, LLC (AllCapital), an indirect wholly-owned subsidiary of Allco, held a 37.555 percent member interest in North American Energy's immediate parent, North American Energy Alliance holdings, LLC (NAEA Holdings). Since then, AllCapital has transferred its entire interest in NAEA Holdings to IFM Nominees. IFM Nominees therefore currently holds and will hold at the time of the consummation of the proposed transaction a 100 percent indirect ownership interest in North American Energy. Applicants assert that this acquisition does not require the submission of any additional information in support of the Application, except for revised organization charts, which Applicants provide in their supplemental filing. We agree and will not require any additional information with regard to the transfer of interest in NAEA Holdings.

2. Effect on Competition

a. Application

14. Applicants state that the combination of generation assets currently owned or controlled by North American Energy, combined with those owned by the Project Companies, is *de minimis* compared to the total installed capacity in each of the relevant geographic markets, ISO-NE[10] and PJM Interconnection, L.L.C.[11] Applicants also state that the output of each of the facilities will continue to be committed under long-term contracts. Furthermore, Applicants state that North American Energy neither owns nor controls inputs to electricity production in any relevant market and does not otherwise have any ability to erect barriers to market entry by competing suppliers.

15. Applicants request a waiver of the horizontal competitive screen analysis in Appendix A of the Merger Policy Statement. They state that the Appendix A analysis is not required in connection with this application because the proposed transaction will have no adverse effect on competition.

b. Commission Determination

16. We find that the transaction will not adversely affect competition. The post-transaction entity will control a very small portion of the total installed capacity in each of the relevant geographic markets and will not control inputs to electricity production in the relevant markets.

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[10] After the transaction, North American Energy will own 806 MW (less than three percent) of the generating capacity in the ISO-NE control area.

[11] After the transaction, North American Energy will own 1056.9 MW (less than one percent) of the generating capacity in the PJM Interconnection, L.L.C. control area.

17. We grant Applicants' waiver request because the extent of the Applicants' business transactions in the same geographic market is *de minimis*.

3. Effect on Rates

a. Application

18. Applicants state that all sales of electric power will continue to be made at market-based rates and under RMR Agreements after the transaction, and that any rates under any cost-based power rate schedules or long-term contract would not be affected by the transaction. Applicants further state that there are no transmission customers whose rates could be affected by the transaction.

b. Deficiency Letter

19. On March 3, 2008, the Commission issued a Deficiency Letter requiring Applicants to list and describe all of the non-market-based rate contracts at issue in the proposed transaction, including any RMR Agreements. The Commission also required Applicants to explain how and to what extent ratepayers are protected, for a significant period of time, from any adverse rate effects resulting from the proposed transaction.

c. Compliance Filing

20. Applicants state that there are two non-market-based rate contracts at issue, and they are both RMR Agreements between CEEMI, Consolidated Edison Energy, Inc., as agent for CEEMI, and ISO-NE.[12] The two RMR Agreements involve: (1) CEEMI's 107 MW West Springfield 3 generating unit (West Springfield RMR Agreement); and (2) CEEMI's two 48 MW GT-1 and GT-2 generating units (GT Units RMR Agreement).

21. Applicants further state that there are two rate schedules at issue that have cost-based revenue requirements: (1) CED Rock Springs Rate Schedule FERC No. 2; and (2) Ocean Peaking Rate Schedule FERC No. 2. These rate schedules cover reactive support and voltage control from generation sources to PJM Interconnection, L.L.C.

22. Applicants assert that the RMR Agreements are the product of negotiated settlements approved by the Commission, and that these settlements expressly provide that CEEMI has waived its section 205 right to increase the annual fixed revenue requirements in the RMR Agreements without the written agreement of all parties to the settlements, except in limited circumstances unrelated to the proposed transaction. CEEMI's waiver of its section 205 rights to increase the fixed revenue requirements is in effect for the remaining term of the RMR Agreements. CEEMI cannot therefore increase rates under the RMR Agreements without either obtaining the agreement of all parties to

[12] *See* Applicants' March 10, 2008 Compliance Filing at 2-3.

the settlements or filing under section 206 of the FPA, in which case CEEMI would have to show that the rates under the RMR Agreements are unjust and unreasonable. Applicants assert that this protects ratepayers from any adverse rate effects resulting from the proposed transaction, and that a mechanism to ensure that rates do not increase after the proposed transaction (i.e., a hold harmless commitment) is therefore unnecessary. Applicants also note that Public Systems do not argue that such a mechanism is necessary.

23. Despite their assertion that there is no need for such a mechanism, Applicants provide a mechanism in response to the Commission's Deficiency Letter. Applicants assert that they commit to hold wholesale customers under the RMR Agreements harmless by not seeking recovery of any transaction-related costs for the remaining term of the RMR Agreements. Applicants explain that they discussed this hold harmless commitment with Public Systems, and Public Systems rejected it, believing instead that there may be grounds for a decrease in the settlement-achieved rates after the proposed transaction.

24. With regard to the cost-based rate schedules, Applicants commit to hold these wholesale customers harmless by not seeking recovery of any transaction-related costs for a five-year period, unless Applicants can demonstrate that transaction-related savings equal or exceed transaction-related costs.

d. Protest to Compliance Filing

25. Public Systems criticize the hold harmless commitments provided by Applicants in the supplemental filing. Public Systems reiterate their argument that these commitments do not adequately protect ratepayers and state that the continued eligibility of the facilities for the RMR Agreements after the transaction has not been demonstrated.[13]

e. Commission Determination

26. We note that the original filing seemed to suggest that there were other non-market-based rate contracts at issue in this proceeding.[14] Our findings in this order are

[13] Public Systems' arguments regarding RMR eligibility are addressed below, *see* section six.

[14] *See* ConEd Development January 9, 2008 Filing at 26 ("Specifically, all sales of power will continue to be made pursuant to market-based rates authorized by the Commission *and wholesale power contracts on file with the Commission, such as the RMR [A]greements. . .*") (emphasis added).

based on the understanding that the list of non-market-based rate contracts provided by Applicants in the supplemental filing is exhaustive.

27. We accept Applicants' commitments to hold wholesale customers harmless from costs related to the transaction. We note that nothing in the application indicates that rates to customers will increase as a result of the transaction. As explained below, if Public Systems believe that there are grounds for a decrease in rates after the transaction, they can pursue that in a section 206 proceeding.[15]

28. In addition, the Commission will be able to monitor the Applicants' hold harmless provision under the books and records provision of the Public Utility Holding Company Act of 2005.[16] Therefore, we find that the proposed transaction will not adversely affect rates.

4. Effect on Regulation

29. Applicants state that they will continue to be subject to the regulation of the Commission (and any other federal and state agency) to the same extent after the transaction as before. We agree that the transaction will not have any effect on regulation.

5. Cross-Subsidization

a. Application

30. Applicants state that the transaction will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. Applicants assert that no franchised public utility with captive customers is involved in the transaction and that North American Energy, Allco, and IFM Nominees are not traditional public utilities with captive customers and are not affiliated with such public utilities.

31. Applicants also state that the transaction will not result in: (1) any transfers of facilities between a traditional utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuances of securities by a traditional utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledges or encumbrances of assets of a traditional utility associate company that has captive customers, or that owns or provides transmission service over jurisdictional

[15] *See* P 39 below.

[16] 42 U.S.C. § 1264 (2005).

transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

b. Protest

32. Public Systems argue that the Applicants have failed to establish a basis for a waiver of their obligation to make a detailed showing with respect to cross-subsidization. Because RMR Agreements impose costs on customers that they cannot avoid or hedge, Public Systems assert that an adequate showing is especially important here.

c. Commission Determination

33. We find that Applicants do not need to make a detailed showing with respect to cross-subsidization. In our Final Rule on Cross-Subsidization Restrictions on Affiliate Transactions, issued February 21, 2008, we clarified the definition of "captive customers" to "make clear that it is intended to refer to customers of franchised public utilities."[17] No franchised public utility with captive customers is involved in this transaction. While the Final Rule does not apply to this proceeding because the application predated it, the rule states the Commission's position on when customers are captive for purposes of cross-subsidization.

6. Miscellaneous

a. Continued Applicability of the RMR Agreements

i. Protest

34. Public Systems argue that Applicants should state whether they intend to continue operating the generating units under the existing RMR Agreements, or whether they intend to terminate the RMR Agreements and if so, when. Public Systems state that if the Applicants intend to continue the RMR Agreements, then North American Energy should submit data demonstrating that, under the new ownership and cost structure, which may involve changes in financial circumstances, the units continue to need the RMR Agreements to remain in operation. They claim that, without such a reporting requirement, customers will not be able to get data regarding the units' post-transaction costs and thus will be less able to determine whether the units remain eligible for RMR Agreements.

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[17] *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 Fed. Reg. 11,013, FERC Stats. and Regs. ¶ 31,264, at P 41 (February 29, 2008).

ii. Answer

35. In response to Public Systems' protest, Applicants assert that this section 203 proceeding is not the proper forum in which to challenge the continued eligibility of CEEMI's RMR Agreements. Applicants state that the RMR Agreements are the product of negotiated settlements approved by the Commission. Applicants also note that the RMR rates cannot be changed as a result of the proposed transaction without either obtaining agreement from the parties to the Commission-approved settlements or pursuant to a section 206 complaint.

iii. Protest to Compliance Filing

36. Public Systems criticize the hold harmless commitments provided by Applicants in the supplemental filing. They reiterate their argument that these commitments do not adequately protect ratepayers because Applicants have not demonstrated that the facilities are eligible for the RMR Agreements after the transaction.

37. Public Systems also note that if the Commission does not require Applicants to disclose their post-transaction cost structure, then Public Systems will not have adequate information to file a section 206 complaint to terminate the RMR Agreements.

iv. Commission Determination

38. The Commission has previously held that a section 203 proceeding is not the place to raise concerns about RMR Agreements.[18] The questions of whether there is a need for an RMR Agreement, and the terms of that Agreement, have no bearing on the factors we consider under section 203. In refusing consolidation requests, the Commission noted that in section 203 proceedings, "the issue is whether the transaction is consistent with the public interest."[19] On the other hand, in RMR proceedings, "the Commission is reviewing proposed rates and conditions to ensure that they are just and reasonable."[20]

39. Public Systems express concern regarding CEEMI's RMR Agreements and question whether the new corporate entity that emerges from the proposed transaction will be entitled to maintain these RMR Agreements. As explained above, these arguments may be raised in a complaint under section 206, and are not appropriate for this section 203 proceeding. If Public Systems believe that rates should decrease as a

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[18] *Boston Generating, L.L.C.*, 113 FERC ¶ 61,016, at P 26 (2005) ("The Commission is examining the RMR cost-of-service issue in the RMR Proceedings, and whether or not Applicants are entitled to RMR rates will be decided in that case.").

[19] *Id.*

[20] *Id.*

result of the proposed transaction,[21] such concerns belong in a section 206 proceeding regarding the justness and reasonableness of rates. We therefore reject these arguments without prejudice to Public Systems' raising them in a later section 206 proceeding.

40. We understand Public Systems' concern that, after the transaction, Public Systems may not have access to Applicants' cost structure information, and that this information would be necessary to initiate a section 206 proceeding to terminate the RMR Agreements. The Commission has held that RMR agreements "suppress market-clearing prices and deter investment in new generation" and should be used only as "a last resort."[22] In *Connecticut Municipal Electric Energy Cooperative v. Milford*, the Commission stated that the just and reasonable standard applies to the Commission's review of RMR Agreements, rather than the higher public interest standard.[23] In making this finding, the Commission acknowledged the position of complainants seeking to terminate RMR Agreements, noting that "the uniquely broad applicability of RMR agreements to markets and market participants alike" made them suitable for the just and reasonable standard of review.[24]

41. The Commission recognizes that complainants in RMR cases cannot be expected to present information they do not have, such as information about cost structure after a facility changes hands. In *Milford*, the parties initiating the 206 complaint (Milford Complainants) seeking to terminate Milford Power Company's RMR Agreement did not have access to non-public data regarding Milford's revenues during the period of its RMR Agreement.[25] The Milford Complainants estimated the amount of payments to Milford based on publicly available information. They also lacked information regarding Milford's actual debt service obligations, and relied on Milford's hypothetical capital structure and cost of debt in its RMR cost of service filing. Using the information available to them, the Milford Complainants presented sufficient evidence supporting termination of the RMR Agreement for the Commission to set the issue for hearing. The

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[21] *See* Applicants' March 10, 2008 Compliance Filing at 5 ("Public Systems were not willing to accept Applicants' hold harmless commitment because of the nature of their protest, which Applicants understand contends that there may be grounds for a *decrease* in the settlement-achieved rates upon consummation of the [p]roposed [t]ransaction. . .") (emphasis in original).

[22] *Bridgeport Energy, L.L.C.*, 118 FERC ¶ 61,243 at P 41 (2007).

[23] *Conn. Muni. Elec. Energy Coop. v. Milford*, 122 FERC ¶ 61,235 at P 9 (2008) (*Milford*).

[24] *Id.*

[25] *Id.* P 6.

Commission noted that information regarding "facility costs such as fixed operations [and] maintenance costs, administrative and general costs, and taxes to revenues earned in the energy and capacity markets" was necessary to determine whether the RMR Agreement in *Milford* was still needed.[26] The Milford Complainants lacked detailed cost structure information for Milford Power Company but were able to present their case using the information available to them. Public Systems will also be afforded an opportunity to file sufficient information to justify setting their case for hearing. We therefore reject Public Systems' request that we order Applicants to disclose their post-transaction cost structure at this time.

b. Order 652 Reporting Requirement

42. The affected jurisdictional facilities in this transaction include market-based rate tariffs and contracts. Order No. 652 requires that sellers with market-based rate authorization timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[27] The foregoing authorization may result in a change in status. Accordingly, Applicants are advised that they must comply with the requirements of Order No. 652.

The Commission orders:

(A) The proposed disposition of jurisdictional facilities is hereby authorized as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before this Commission.

(C) The Commission retains the authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the acquisition and disposition.

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[26] *Id.* P 29-30.

[27] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

(F) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(G) The Commission will hold Applicants to their commitment to hold wholesale power customers harmless for costs related to consummation of the transaction.

(H) Applicants shall notify the Commission within 10 days of the date that the acquisition and disposition of jurisdictional facilities have been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.